

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

91

UNITED STATES COURT OF APPEALS

For The

DISTRICT OF COLUMBIA CIRCUIT

NO. 24,280

James T. Benn,

Appellant

Claudia H. Borthwick,

Appellee

On Appeal From An Order Of The
United States District Court
For The District Of Columbia

APPELLANT'S BRIEF

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF ISSUES OR QUESTIONS
PRESENTED FOR REVIEW

This appeal presents the following issues or questions for review:

1. Should the District Court have granted appellant's motion to quash an alleged personal service of process made on appellant in Virginia, i.e. beyond the territorial limits of the District of Columbia, by the device of merely posting a copy of the summons and complaint on appellant's apartment door in Virginia? A subsidiary question is whether the District Court properly denied the motion to quash on the theory that, while such service might be a nullity under Rule 4 (d) and (f) of the Federal Rules of Civil Procedure, appellant was still bound thereby and subject to the jurisdiction of the District Court because his motion to quash, filed pro se, indicated that he had acquired notice of the complaint in the District Court action.

2. Does the amended complaint state a claim upon which relief can be granted under either the Securities Act of 1933 or the Securities Exchange Act of

1934? A subsidiary question presented is whether Section 22 (a) of the Securities Act of 1933 (15 U.S.C. § 77v(a)) and/or Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa) authorize extra-territorial service of process in a case of this kind; and if so, was proper extra-territorial service made on appellant in this instance.

3. Does the amended complaint state a claim upon which relief can be granted under Title 2, Section 2414 of the District of Columbia Code?

4. Should this action be transferred to the United States District Court for the Eastern District of Virginia?

In response to the requirements of Rule 8(d) of the Rules of this Court, appellant states that this appeal is before this Court for the first time and it has not been before this Court under the same or similar title at any prior time. The right to appeal, of course, was granted by this Court by an Order entered in Misc. No. 3533 on April 21, 1970. ^{Reference To Rulings} The Order appealed from was issued by the District Court on February 27, 1970, denying appellant's motions to dismiss, quash service or transfer the action to the District Court in Virginia.

STATEMENT OF THE CASE

The amended complaint in this case purports to assert a complaint for damages under the Securities Act of 1933, the Securities Exchange Act of 1934 and the District of Columbia Securities Act of 1964. Service of process was made in Virginia by a deputy marshal who apparently simply attached the summons and complaint to the door of appellant's apartment located in Virginia. Appellant moved to quash such service of process and he moved to dismiss the complaint on the further ground that it failed to state a claim upon which relief could be granted under any of the Securities Acts listed above. In the alternative, appellant moved for an order transferring the case to the United States District Court in Virginia.

The District Court denied the motion to quash, the motion to dismiss, and the motion to transfer, but entered an order on February 27, 1970 which authorized appellant to apply to this Court for permission to appeal under the provisions of Title 28 United States Code, Section 1292 (b), the Court having ruled that the case

involves controlling questions of law as to which there is substantial ground for difference of opinion. Appellant applied for permission to appeal, and his application was granted on April 21, 1970.

The basic facts, taken principally from allegations contained in the amended complaint, are as follows: Appellee is a citizen of Maryland and appellant is a citizen of Virginia (App. 8). Capital Investors Co., also named as a defendant in the case, is a Florida corporation; it does not have a place of business in the District of Columbia, and it is not qualified to do business here (App. 8, 9).

The amended complaint then goes on to allege that appellee purchased 1-1/2 shares out of 50 shares of stock in the said Florida corporation from appellant; that the purchase agreement gave appellee an option to rescind the purchase agreement within 60 days; and that on April 3, 1969, appellee did exercise the option to rescind (App. 8, 9). Appellant accepted appellee's decision to rescind the agreement, but on April 19 appellee executed a paper which revoked her rescission of the prior contract (App. 10).

Appellee thus delivered to appellant various securities and credit instruments in accordance with the terms of the agreement (App. 8, 9). The amended complaint alleges that appellant failed to inform appellee of various facts and factors regarding the Florida corporation, and it alleges that attorney Elaine W. Kerr, who acted as appellee's counsel in connection with a portion of the transaction, also "represented" appellant and the Florida corporation (App. 10). The amended complaint concludes by alleging that, in line with the agreement, appellant paid appellee \$1,000 on April 12, 1969, but that the entire transaction constituted a "conspiracy to defraud" appellee (App. 10). The complaint thus seeks "restitution and damages for violation of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Act of 1934 and Rule X10(b)(5) of the Rules and Regulations promulgated thereunder, and for violation of the District of Columbia Securities Act (1964), Section 2-2402."

In his affidavit in support of the various motions he filed pro se, appellant states that in the latter part of March, 1969, appellee telephoned him at his residence in Virginia and arranged to meet with him

in Rosslyn, Virginia to discuss a possible secured loan (App. 18). After some discussion at the Rosslyn meeting, he states, the suggested loan to appellant was converted to an arrangement whereby appellee agreed to exchange properties she held worth approximately \$46,000 for 1-1/2 shares of stock appellant held in the aforementioned Florida corporation (App. 18, Exhibit C to appellant's affidavit). The memorandum agreement prepared to confirm this "exchange" transaction states on its face that "100% of the voting stock of Capital Investors Co. (the Florida corporation) is worth approximately \$1,450,000.00 as certified by a certified public accountant", and that the said 1-1/2 shares of stock represented about 3% of the voting stock of the said corporation (App. 18, Exhibit C to appellant's affidavit).

The "exchange agreement" mentioned above also specifically afforded appellee the option to rescind the arrangement within 60 days, and as stated in the amended complaint, she did exercise that option to rescind within a matter of days. Appellant states in his affidavit that at or about the same time, she placed "Stop-orders" on some of the security items she had transferred to appellant

pursuant to the exchange arrangement (App. 18). In any event, on April 12, 1969, a rescission agreement was duly executed and appellant agreed to return those items of appellee's property which he still held and to reimburse appellee for those which had already been transferred by him (App. 18, 19; Exhibit D to appellant's affidavit).

Appellant states in his affidavit that, on April 18, 1969, however, appellee asked him to meet with her again at Attorney Kerr's office in Virginia, at which meeting she stated she had again changed her mind and was once again desirous of proceeding with the original "exchange arrangement" (App. 19). This time, appellant states, appellee wanted to rescind the rescission of April 12, 1969 (App. 19). Appellee advised appellant that she had personally inspected the real estate owned by Capital Investors Co. in Rosslyn, Virginia; that she had had an attorney other than Elaine Kerr inspect the property and examine all documents of record, and that he had advised her that the exchange "transaction is a good business deal" (App. 19).

Accordingly, appellant and appellee met again at the offices of Attorney Kerr in Falls Church, Virginia

on April 19, 1969, and there they executed a new agreement ratifying and confirming the original property "exchange" arrangements (App. 20, Exhibit D to appellant's affidavit). Appellant states that appellee thereupon received a further \$1,000 payment from him, and the parties left apparently satisfied with the entire exchange transaction. However, appellant states that, without advising him, appellee either continued in effect or reinstated the "Stop Orders" referred to above on some of the security items she transferred to appellant under the agreement and such "Stop Orders" were never released by appellee (App. 21).

Appellant states in his affidavit that appellee thereafter retained counsel who now represents her in the pending action, who again requested rescission of the exchange arrangements on behalf of appellee (App. 21). Appellant states that he "again agreed to rescind but that this as yet has not materialized" (App. 21).

Concerning the District Court's jurisdiction and the matter of service of process in the District Court action, appellant's affidavit, filed pro se, states (App. 21):

"This Defendant was not served with Process within the District of Columbia; does not transact business within the District of Columbia; is not licensed to transact business in the District of Columbia; did not offer for sale or did he sell the subject one and one-half shares of stock involved here within the District of Columbia; did not use the mails nor did he use the telephone in the District of Columbia nor in any other District in connection with the said one and one-half shares of stock. The Plaintiff had full and complete knowledge that the subject one and one-half shares of stock involved here is a private sale, a transfer of stock from one person to one person and is a non-public offer and is an exempt transaction and that all negotiations and transactions and agreements involved were all done within the Commonwealth of Virginia.

"This Defendant was not served with Process within the District of Columbia but instead service was made within the State of Virginia, not personally as set forth in the Marshal's Return but the Summons and the Complaint was (sic) posted on the door; such service is not authorized under the Federal Rules of Civil Procedure nor under the Provisions applicable to the District of Columbia Code."

POINT I

Personal Service On Appellant Was Invalid Where The Summons And Complaint Were Simply Affixed To The Door Of His Apartment. And, Unless This Case Falls Properly Within The Scope Of Those Provisions Of The Securities Laws Which Authorize Service Beyond The District Of Columbia, The Service Of Process In Virginia Is Invalid.

Appellant swears in his affidavit that the summons and complaint, served in Virginia, were simply affixed to the door of his Apartment No. 1140, located at 1200 North Nash Street, Rosslyn, Virginia (App. 16, 22).

Such service is patently insufficient and invalid under Rule 4(d) of the Federal Rules of Civil Procedure. Personal service, within or without the territorial jurisdiction of the District Court below, is effective only when copies of the summons and complaint are personally served on the defendant himself or when copies of same are left "at his dwelling house or usual place of abode with some person of suitable age and discretion then residing there-
in...."

The District Court failed to grant appellant's motion to quash such service apparently on the basis of its

stated theory that appellant, having appeared to file a motion to quash, somehow derived notice of the suit and therefore was properly before the Court. No such theory is Constitutionally sustainable under Rule 4(d) of the Federal Rules. Service of process, which consists exclusively of posting the summons and complaint on a door of an apartment in a large apartment building does not "measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment requires" (Schroeder v. City of New York, 371 U.S. 208, 211, 83 S. Ct. 279, 282). "An elementary and fundamental requirement of the process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (Schroeder v. City of New York, supra, at 371 U.S. 211; Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339; Grannis v. Ondean, 234 U.S. 385, 34 S. Ct. 779; Priest v. Board of Trustees, 232 U.S. 604, 34 S. Ct. 443; Roller v. Holly, 176 U.S. 398, 20 S. Ct. 410; Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S. Ct. 652).

Rule 4(d)(1) specifically prescribes how "Personal Service" is to be made upon an individual. It states that the summons and complaint shall be delivered "to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein...." It says nothing about merely "posting on the door".

Indeed, for such "Other Service" to be valid, it must be shown under Rule 4(e) of the Federal Rules that "a statute of the United States or an order of court provides" for such substituted service. There is no such statute applicable to this case and, of course, no rule or order was issued by the District Court prior to such service specifying that service upon appellant was to be made by posting the summons and complaint on the door of his apartment. Ergo, the District Court erred by failing to grant appellant's motion to quash.

And, of course, if such alleged "personal service" would be invalid even in cases where service is made within the confines of the District of Columbia, it is at least equally invalid when made in Virginia in an

action pending in the District Court for the District of Columbia.

Finally, personal service of process in Virginia in an action pending in our District Court is likewise totally invalid, under Rule 4(f) of the Federal Rules, unless it can be shown that "a statute of the United States....provides" for service "beyond the territorial limits" of the District. Here, appellee contends that such service can be made under one or both of the federal Securities Acts. Appellant vigorously denies that either of those statutes has any applicability whatsoever to this action, and that, therefore, service made beyond the District pursuant to either or both is null and void under Rule 4(f) of the Federal Rules.

We now turn, therefore, to a discussion of appellant's position under those two federal statutes.

POINT II

Under The Express Provisions of Section 22(a) Of The Securities Act of 1933 and Section 27 Of The Securities Exchange Act of 1934, This Court Does Not Have Jurisdiction Over The Cause Of Action Alleged In The Amended Complaint. The Said Complaint Must Therefore Be Dismissed And The Service Of Process Made In Virginia In Purported Compliance With Provisions Of Those Two Statutes Must Be Quashed.

Section 22(a) of the Securities Act of 1933 (15 U. S. C. 77v(a)) provides:

"The district courts of the United States... shall have jurisdiction of offenses and violations under this subchapter...and, concurrent with State... courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein; and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found..."

(Emphasis supplied)

Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa), in turn, similarly provides:

"The district courts of the United States... shall have exclusive jurisdiction of violations of this chapter...and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter... Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation

occurred. Any suit or action to enforce any liability or duty created by this chapter...or to enjoin any violation of such chapter...may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found..."

(Emphasis supplied)

Leaving aside for later discussion the fact that the amended complaint fails to allege any cognizable violation on the part of appellant of either the Securities Act or the Securities Exchange Act or that he breached "any duty" or assumed "any liability" prescribed by either of the said Acts, we submit that this Court completely lacks jurisdiction over this action because:

1. The record before the Court shows that appellant was not "found" or served with process in the District of Columbia.

2. The Amended Complaint concedes on its face and the sworn, uncontradicted evidence before the Court shows that appellant is not an inhabitant of the District of Columbia.

3. The Amended Complaint fails to allege that appellant transacts business in the District of Columbia,

and appellant's affidavit herein denies that he transacted any business here. Indeed, the Amended Complaint affirmatively alleges that defendant Capital Investors Co., the Florida Corporation here involved, does not have a place of business in the District of Columbia and that it is not qualified to do business here.

4. The Amended Complaint fails to allege that any "offer or sale" of any security "took place" in the District of Columbia or that any specific "act or transaction constituting (an alleged) violation" of the Securities Exchange Act "occurred" within the District of Columbia. At best (and totally without specification of any kind) the Amended Complaint asserts: "All acts and transactions complained of originated in the District of Columbia". Simultaneously, however, the affidavit of appellant, which has not been contradicted in this regard by affidavit of appellee, states that all negotiations and agreements involved between the parties took place in the State of Virginia.

Jurisdiction, of course, must be distinguished from mere venue. In Neirbo v. Bethlehem Shipbuilding Corp. (1939), 308 U.S. 165, at page 167, the Supreme Court distinguishes the two as follows:

"The jurisdiction of the federal courts-- their power to adjudicate -- is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. By the locality of a lawsuit -- the place where judicial authority may be exercised -- though defined by legislation relates to the convenience of litigants and as such is subject to their disposition."

Here, of course, we are dealing with the question of this Court's basic jurisdiction over the subject matter of the amended complaint. And, unless that complaint, in clear, concise factual allegations, establishes the jurisdiction of the Court, or if the complaint negates such jurisdiction, it plainly should have been dismissed by the District Court. The two statutes involved set forth their own specific jurisdictional requirements. The amended complaint does not allege and cannot allege that appellant Benn resides in the District of Columbia; or that he transacts business here; or that an "offer or sale took place" in the District (indeed, as the record shows, this case at best involves a mere "exchange" of property by appellee and appellant); or that any act constituting a violation of the Securities Exchange Act "occurred" within the District. Ergo, the Court is powerless to proceed further with the complaint and same must be dismissed for lack of jurisdiction under the

two statutes (Olympic Capital Corporation v. Newman, 276 F. Supp. 646 (U.S.D.C., Cal., 1967); Chambliss v. Coca-Cola Bottling Corporation, 274 F. Supp. 401 (U.S.D.C., Tenn., 1967)). In other words, appellee, having failed to allege or show, in the terms specified by the two statutes themselves, that the District Court below has jurisdiction over her cause, her claim for relief so stated is one upon which relief cannot be granted by the District Court. (Rosenberg v. Globe Aircraft Corporation, 80 F. Supp. 123 (U.S.D.C. Pa., 1948)).

There is literally nothing in the amended complaint which suggests that appellee's suit is brought "to enforce any clear-cut liability or duty created" by the Securities Act of 1933 itself. And yet, as stated above, the District Court's jurisdiction is specifically limited by Title 15 U.S.C Section 77v to "suits...brought to enforce any liability or duty created by this subchapter." Here the amended complaint recites a claim for relief limited entirely to a private "exchange" of properties (cash, real estate, insurance and stock) between two persons (appellee and appellant). There is no allegation that any effort was made by appellant to avoid or defeat the registration

requirements of the Act by using the mails or some instrument of commerce "to sell" a security "through the use of any prospectus" etc., without first filing a registration statement with the Securities Exchange Commission (See 15 U.S.C. Section 77e); or that appellant violated any registration provision of the Act (See 15 U.S.C. Sections 77 f, g, h); or that appellant issued or circulated an illegal prospectus (See 15 U.S.C. Sections j, l).

In fact, the Securities Act of 1933 itself makes it perfectly clear, at 15 U.S.C. d(1), that the provisions of the Act relating to registration, etc., (15 U.S.C. 77e) do not apply to:

"transactions other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering..."

In the case at bar, there is no allegation in the complaint that any stock was offered or sold by an "issuer" without compliance with the registration requirements of the Securities Act — and, of course, the complaint says nothing about "any public offering", the sole transaction complained of being an exchange of various properties

between appellant and appellee in a private transaction. Appellant contends, therefore, that what is alleged in the amended complaint is nothing more or less than "a private transaction" — one which is specifically designated as an "Exempted Transaction" under the Securities Act of 1933 (15 U.S.C. Section 77d).

And, of course, if the entire transaction between appellant and appellee is an "Exempted Transaction" under the express terms of the Securities Act of 1933, appellee cannot conceivably maintain a cause of action in the District Court, under the Securities Act itself (15 U.S.C. Section 77v), to "enforce any liability or duty created by the Act," because, as stated, the Act itself exempts private property exchange transactions of the nature here involved from the scope of the statute.

Similarly, appellee's action under the Securities Exchange Act must be dismissed because again, she has failed to allege in her amended complaint any action "to enforce any liability or duty created" by that Act (See 15 U.S.C. Section 78aa). Like the Securities Act, the Securities Exchange Act of 1934 gives the district courts jurisdiction only over

suits or actions brought "to enforce any liability created by this chapter or rules and regulations thereunder" (15 U.S.C. Section 78aa). In its very first section (15 U.S.C. 78b), the said Act makes it clear that its purpose is to regulate "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets".

There is nothing in the statute itself to indicate or suggest that it was enacted to apply to a private transaction whereby persons such as appellant and appellee merely engaged in an exchange of various properties, one such property being 1-1/2 shares out of 50 in a small, closely held corporation whose securities have never been the subject of transactions "upon securities exchanges and over-the-counter markets." Indeed, the Act itself, in its definition section (15 U.S.C. 78c), expressly defines an "exempted security" as "securities which may include, among others, unregistered securities, the market in which is predominantly intrastate."

Here, the 1-1/2 shares involved are in a corporation which appellee concedes has a total of only 50 shares, and there is nothing in the amended complaint or elsewhere to indicate the said security has any "market" at all; or if so, whether the "market" is limited entirely to Virginia

where the corporation's real estate is located.

Finally, any reasonable reading of the Securities Exchange Act itself readily demonstrates that the Act was enacted principally to establish the Securities Exchange Commission and to provide for the registration of National Securities Exchanges and transactions on those Exchanges (See 15 U.S.C. Sections 78d-u).

The foregoing, in summary, demonstrates why the amended complaint in the case at bar simply fails to state any claim upon which relief can be granted by the District Court under either the Securities Act of 1933 or the Securities Exchange Act of 1934. Obviously, therefore, the District Court should have granted appellant's motion to dismiss.

In any event, it is perfectly clear, we submit, that appellee could not rely on either the Securities Act of 1933 or the Securities Exchange Act of 1934 as authority for bringing suit against appellant in the District of Columbia and for making "extra-territorial" personal service in Virginia. As stated before, Rule 4(f) strictly prescribes that service "beyond the territorial limits" of the District

of Columbia is proper only "when a statute of the United States so provides." If, as appellant contends, neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 is properly applicable to the case at bar, then neither 15 U.S.C. 77v nor 15 U.S.C. 78aa are available to justify service of process on appellant in Virginia.

Appellant submits, therefore, that both the motion to dismiss and the motion to quash were incorrectly denied by the District Court and that such holdings must be reversed upon this appeal.

POINT III

The Amended Complaint Must Also Be Dismissed Insofar As It Is Grounded On Title 2, Section 2414 Of The District Of Columbia Code (1967 Edition) Because Again There Is No Allegation That An Offer Or Sale Took Place In The District.

First of all, of course, without the benefit of the federal statutes discussed in Point II, appellee has no right to serve process in this action beyond the limits of the District of Columbia. Moreover, if the complaint based on the federal Acts is dismissed and service of process is quashed as prayed in Point I, then the suit based on the D. C. Code provision mentioned above must likewise fall. Section 2414 of Title 2 expressly limits the D. C. statute and its provisions to "persons who sell or offer to sell when (1) an offer to sell is made in the District or (2) an offer to buy is made and accepted in the District".

Here too, the amended complaint fails to allege that an offer to sell or buy was indeed made in the District. That would be impossible, of course, because in this case, there was no flat "offer to sell" or "offer

to buy" -- merely an agreement "to exchange" various properties, among which were shares of stock. Moreover, without contradiction, appellant's affidavit alleges that all steps in the negotiating process -- i.e. the original "exchange negotiations" and the subsequent "rescission negotiations" took place in Virginia. The actual final agreements which finally eliminated appellee's initial rescission, likewise were made in Virginia. Thus, as in the case of the federal statutes, appellee's reliance on the District of Columbia Securities Act is misplaced.

POINT IV

In Any Event, Venue In This Action Is Properly
In Virginia Not The District Of Columbia And
The Action Should Be Transferred.

Should this Court for any reason agree with the District Court and hold that appellee should be permitted to continue to maintain this action against appellant in its present form, then we respectfully submit that the action should be transferred to the United States District Court for the Eastern District of Virginia. 28 U.S.C. 1391 provides, under the heading "Venue generally", that

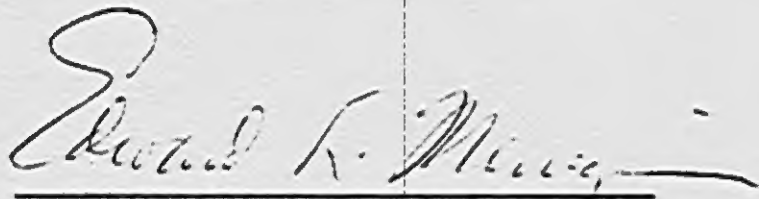
in "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." Here, 15 U.S.C. § 77v, upon which appellee relies, follows 28 U.S.C. 1391 by directing that an action under the Securities Act of 1933 should be brought "in the district wherein the defendant is found or is an inhabitant... or in the district where the offer or sale took place...." A very similar provision is found in the Securities Exchange Act at 15 U.S.C. § 78aa.

All statutory provisions thus point to Virginia, where appellant resides and where the exchange and rescission transactions and negotiations between appellant and appellee took place, as the proper place or venue for this action.

Accordingly, we submit that the District Court erred further by failing to grant the motion for change of venue in this instance, and we therefore respectfully ask this Court, pursuant to Title 28 U.S.C. § 1404, to grant

a change of venue and to transfer this action to the
United States District Court for the Eastern District of
Virginia.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Edward L. Merrigan", written over a horizontal line.

July 10, 1970.

Edward L. Merrigan
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